INDUSTRIAL COMMERCIAL MORTGAGES

THE REAL ESTATE MART

INDUSTRIAL COMMERCIAL MORTGAGES

Real Estate

Real Estate

The City of New York Requests Proposals

The Office of Property Management of the Department of Housing Preservation and Development is soliciting proposals from interested parties who are prepared to provide construction management services for the intended reconstruction of approximately fifteen (15) vacant and partially occupied buildings located in Manhattan, Brooklyn, Queens and the Bronx. The size of the buildings involved in this program range from four (4) to eighty-four (84) units. The estimated value of the reconstruction work is approximately nine million dollars. Funding for this program has been authorized under the New York City Capital Budget. The Office of Property Management intends to enter into three (3) contracts with one or more qualified construction management organizations to perform the required reconstruction work.

The Request for Proposals package including bonding and insurance requirements may be obtained upon application to Contract Processing, Office of Property Management, Bureau of Technical Services, Bid Section, 5th Floor at 75 Maiden Lane, New York, New York 10038; telephone number (212) 806-8581. A nonrefundable fee of $50.00 certified check or money order is required payable to the Comptroller of the City of New York.

Proposals must be submitted no later than 4:30 P.M., December 2, 1983 to the above address. No late Proposals will be accepted.

A Pre-Bid Conference will be held at 75 Maiden Lane, 4th Floor Conference Room, New York, New York 10038 at 10:30 A.M. on November 15, 1983.

NOTE: Questions pertaining to the documents may be directed to David Chin, P.E., Director of Technical Services at 806-8396.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

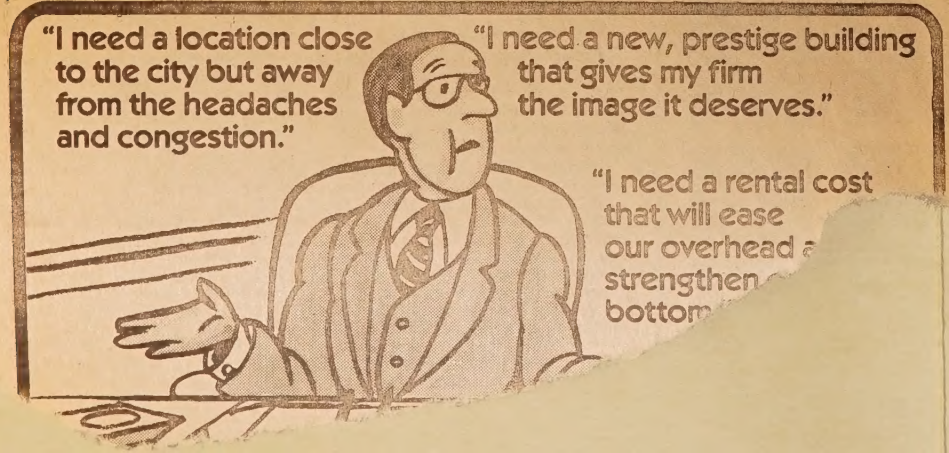
75 Maiden Lane, New York, New York 10038

EDWARD I. KOCH, MAYOR

ANTHONY GLIEDMAN, Commissioner
JOSEPH SHULDINER, Deputy Commissioner
DOMINICK CATANIA, Asst. Commissioner

Long Island

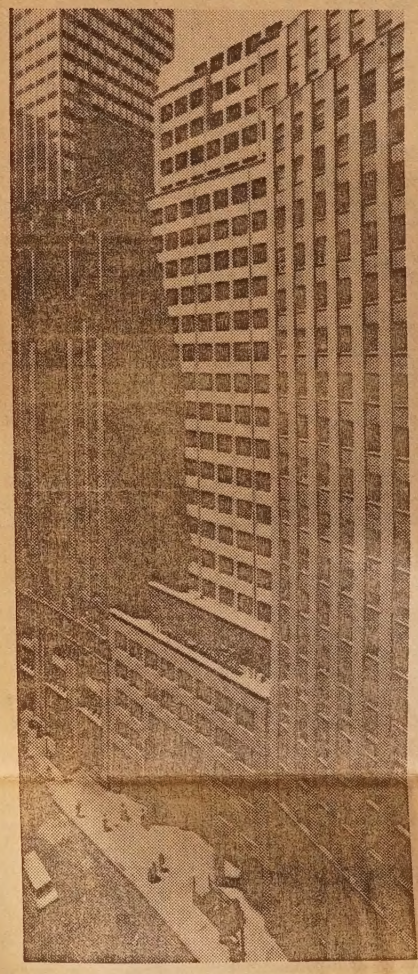
Long Island


"I need a location close to the city but away from the headaches and congestion."
"I need a new, prestige building that gives my firm the image it deserves."
"I need a rental cost that will ease our overhead
strengthen
bottom

Manhattan

Manhattan

40 Broad Street welcomes you even if you didn't make the Fortune 500 this year



Every big business has to start someplace.

40 Broad Street treats small and mid-sized businesses with the attention and respect that others give only to the giants.

We designed and built 40 Broad to the standards of tenants with the highest expectations. Exacting levels of quality are evident throughout — from the smallest custom brass fitting to the spacious design of the polished granite main entrance, lobby and the landscaped plaza beyond.

At 40 Broad, corporate quality, high technology, and low loss factors add up to maximum value for all tenants.

We have for immediate occupancy, divided floor units of 3,500 to 7,500 square feet that afford superb accommodations and services.

Our economic package and expeditious construction scheduling invite you to move right in and move up to
yo

40 B

Lawyers Challenge City on Sidewalk Injury Suits

Continued From Page A1

we come in with filling up the potholes quickly."

Personal-injury lawyers contend the city does not and never intended to fill the holes more quickly. They labeled the law "a fraud," "a farce," "a shameful technicality" and "the biggest mishmash you could ever get."

The city responds that it must defend itself from its increasing losses and that the only localities in the state that still have no prior-notice law are Yonkers and Lackawanna.

Problem of Prior Notice

The lawyers call the law cynical, saying that the city does not care about people who are hurt by the defects and that bureaucratic procedures make it difficult for citizens to fulfil the requirements of prior notice.

The city answers that the legal concept of negligence involves prior knowledge of a dangerous situation and that "you can't blame someone for a defect if he had no opportunity to know about it," as one official put it.

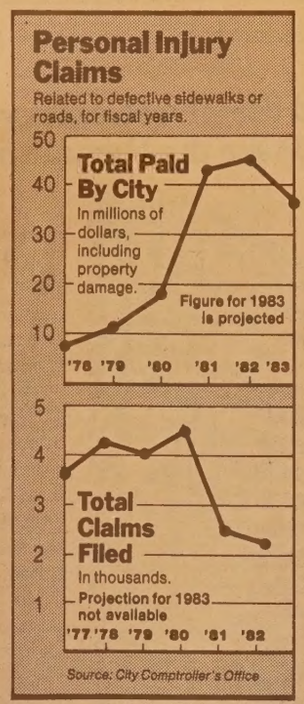
In the heat of battle, the temperature of the rhetoric has risen, as each side accuses the other of being dishonorable.

"I have a strong view on the fact that so many of our innocent victims are entitled to compensation and are being defrauded time and again by this outrageous technicality," said a negligence lawyer, Harry W. Lipsig of Manhattan.

"I think they prefer streets to be in bad shape so they can bring more lawsuits," said the City Corporation Counsel, Frederick A. O. Schwartz Jr., in a telephone interview. "It's their bread and butter, and they like defects."

Saving Put at $26 Million a Year

Almost three and a half years after the law took effect on June 4, 1980, there is some disagreement on both sides about its overall effects.



The New York Times / Nov. 2, 1983

Reached by telephone, Mr. Goldin said he believed that despite the continued high level of settlements, the city is saving $26 million a year. Mr. Schwartz said he wondered whether lawyers who find prior notice difficult to comply with will simply find other areas, such as malpractice suits against the city, on which to concentrate.

Sheridan Albert, former president of the Trial Lawyers' Association of New York, who calls the pothole corporation "my brainchild," doubted the law would drive any lawyers from pothole practice and even suggested the increased documentation it requires would make it easier for juries to rule in injury cases.

A colleague, Aaron J. Broder of Manhattan, said:

"I personally don't have the passion nor the tenacity to pursue these cases any longer. They're prohibitive."

Number of Claims

Figures gathered a year ago by Mr. Goldin showed a drop in claims since the law took effect. A spokesman for his office, Jon Lukomnik, said such early data might be deceptive, because suits can take from two to seven years to reach a conclusion.

While other claims against the city have continued to climb, personal-injury claims involving roadways and sidewalks dropped, from 4,544 in fiscal 1980 to 2,211 in 1982. In fiscal 1983, the number of claims rose, to 4,732.

In fiscal 1982, 2,256 were disallowed on prior-notice grounds, and in 1983, 1,626 were denied, according to the Comptroller's office.

"I think we're winning," said Leonard Mentzer, chief of the tort division of the Corporation Counsel's office.

$50 Search Fee

The Big Apple group, a nonprofit corporation, spent $100,000 for its first round of map making in Manhattan, Brooklyn and the Bronx, a sum it raised from members and from search fees for the use of its records.

A lawyer pursuing a claim can pay $50 to search for a map marking the defect in question, and if it is found, can pay another $50 for a photostat of the map and the city's certificate of receipt, according to Fred Queller, the lawyer who heads the corporation.

The lawyer has 90 days from the accident to file a notice of claim with the Comptroller's office, which might disallow the claim on technical grounds such as lateness of filing or lack of prior notice. If the claim is accepted, the city usually offers to settle, and if the offer is rejected, the claimant has a year plus 90 days to sue.

The lawyers say they plan to map the five boroughs, for a total of more than 5,000 maps, each showing a four-block area in high, black-and-white detail.

As before, their symbols will show sections of raised and uneven sidewalks, holes or hazardous depressions, broken sidewalks, obstructions, broken or uneven curbs, and potholes or other hazards in crosswalks.

The city has budgeted $180,000 this year to follow up on the mappers. Julian Prager, assistant commissioner of transportation for management and the man in charge of the prior-notice program, said 100 or more temporary employees would be engaged once again to retrace the routes.

Almost forgotten in this expensive game are the innocent victims, the people with legitimate claims.

In fiscal 1982, some of the biggest settlements went to:

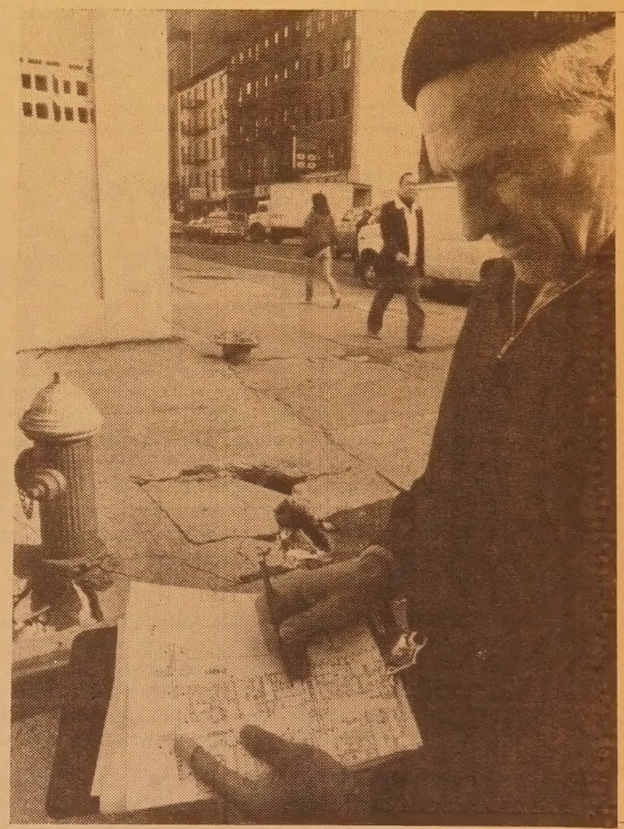
¶A schoolteacher who said she had broken her hip in an irregularly shaped hole, suffering a permanent disability, $400,000.

¶An Offtrack Betting promotion manager was said to have tripped over a raised manhole cover while carrying a projector and sustained back injuries leading to forced retirement, $225,000.

¶A police officer who said he had tripped on a six-inch stub of a removed parking meter, fracturing his elbow and forcing his retirement, $210,000.

The city, which has made it more difficult for such people to sue, points to the very large settlements they are winning, of which a sizable portion goes to the lawyers, and argues it is faced with a serious budgetary problem.

"No one wants to see someone break a leg. It's an unfortunate occurrence," Mr. Mentzer said. "But if you have limited dollars, if there is not enough money for schoolrooms and the police, maybe we can find more important needs that cry out for those revenues."



The New York Times / William E. Sauro

Howard Basteri, an investigator for a lawyers' group, conducting a survey of the condition of sidewalks in lower Manhattan.

City Releasing 341 Inmates From Its Overcrowded Jails

Manhattan. It permitted the city to re- inmates to pay 10 percent of their

The City

A $17,000 Treat On Halloween

By United Press International

A man turned in a shoebox stuffed with $17,000 on Halloween, and he will probably be able to keep the money because the owner is likely to be drug dealer and unwilling to claim it, the police said yesterday.

Detectives of the Seventh Precinct said the man, who was not identified, found the money around 11:30 P.M. Monday as he walked in front of 170 Madison Street, part of a housing project between Pike and Rutgers Streets on the Lower East Side.

The man peered into the box and, after seeing it was filled with $10, $20 and $50 bills, turned it in to the police, the authorities said.

Sgt. Sam Edwards said the owner ... to claim the money. If no ... Sergeant Edwards ... man

Flushing Hospital Loses Court Effort

By The Associated Press

Flushing Hospital has failed in efforts to withdraw its plea of guilty to turning away an 89-year-old heart-attack victim, the Queens District Attorney's office reported yesterday. The victim, Katherine Streletsky of Corona, Queens, died two hours later at another hospital.

District Attorney John J. Santucci said Judge Michael Corriero of Criminal Court rendered an oral decision Monday rejecting a motion by Flushing Hospital last July to withdraw a plea of guilty entered July 7, 1982. As a result of the plea, the hospital was fined $2,000.

The State's Public Health Law prohibits denial by a hospital of emergency care to anyone in need who seeks treatment.

Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982)

Kincaid was being held pre-trial in county jail on murder charge. He complained, inter alia, of being denied access while in jail to any reading material other than soft cover non-pictorial books such as Readers Digest & non-pictorial magazines. No Sports Illustrated, Playboy or Newsweek because guys cut out pictures & pasted them up. No newspapers because they
743 used them to start fires or jam toilets. No hard cover because used as objects to throw.

Ever since Wolfish, Bell v., 441 U.S. 520 (1979) there has been a special & narrower standard applied to prisoner's suits ~~to~~ claiming unlawful detention conditions.

Held - These 1st Amend. impacting restrictions, presented as necessary for jail security - are not least restrictive necessary & violate "time, place, & manner" rules.

On amount of damages Kincaid entitled to, Ct. notes he failed to prove any injury. He never tried to get any of the outlawed
746 reading material. He mostly played cards.
" He claimed no mental & emotional distress" or that he desired access to prohibited reading material." Counsel admitted there was no evidence of compensable injury at trial.

Because the restrictions were not serious enough to amt to an 8th Amd. violation, No $ damages other than $1.00 - for 1st

Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982)

Pft. is an owner of an adult porno film theater.

1211 "The First Amendment protects the right to hear as well as to speak. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976)." Virginia State Board holds that F.A. protection extends to the communication, its source & recipients both. 425 U.S. at 756.

1211 n. 4 This holding in Va. St. Bd. is not limited to cases where the speaker is prevented from raising the F.A. question but confers standing on hearers as well.

Only part of local ordinance restricting location of adult theaters to be found infirm was a virtual ban on advertising. Pft. had put up a sign saying "Adult Theater" which he had to take down. This temporary violation of his First Amd. rights to pure commercial speech 1219-20 entitles him to damages (but not much). Where "no real injury" only nominal damages.

Hentoff v. Ichord, 318 F.S. 1175 (DCDC 1970)

Facts — House Cmt on Internal Affairs prepared a list of 65 persons who it said spread "pernicious propaganda" of the New left for which they rec'd substantial fees for speaking on colleges. The list was designed to encourage colleges & alumni to refuse to make $ contributions if such persons were allowed to speak.

Held: Although Congress members have free speech right like everyone else, as legislative purpose here found. It is clearly to inhibit speech. Injunction against public printing of report. It can still go in Cong. Rec.

n.1 1177 — Note list of 12 orgs. association with which committee considered per se proof of subversion: SWP, New Mobe, Spring Mobe, Nat'l Mobe.

Harry Edwards's decision → Doe v. Dist. of Col., 697 F.2d 1115 (DC Cir. 1983)

Eighth Amendment & Statutory challenge to conditions in maximum security prison at Lorton.

Error to have failed to give an instruction precluding possibility of holding DC liable solely on basis of respondeat superior for unauthorized acts of its employees

p. 1121 that may turn out to be constitutional torts.

Carey v. Piphus means to extend its basic compensation analysis "to all constitutional rights, substantive as well as procedural."

p. 1123

It is equally clear that damage awards in constitutional tort cases are "limited to sums necessary to compensate pltfs. for actual harm."

n. 15 Cites Halperin as a case "seeking to explain away Carey's adoption of the compensation principle", 606 F.2d 1192, 1207 nn. 100-101. (DC. Cir. 1979).

It is difficult to defend a refusal to extend

p. 1123 Carey to Bivins actions. In applying Carey's teaching that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question ..." Carey 435 US at 259.

1123 "In applying that injunction to suits like the one at bar, we must remember that we are dealing with prisoners, who in most instances are persons who have been convicted of committing serious crimes."

1124 The prisoners rights asserted here correspond fairly closely to common law torts - intentional & negligent harm. The interests the prisoners assert infringement of are three: 1) bodily integrity

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(2)

Doe, (cont).

2) peace of mind; and 3) earning capacity. (Prisoners have a right not to have their ability to earn a living after released reduced by the conditions during their incarceration).

Because jury was instructed to determine intrinsic value of Eighth Amendment rights, in addition to liberal comp. for actual injury - revsd + remanded for a new trial.

NB - Our jury instructions comply w/ Doe because there was no mention of awarding damages apart from actual injury.

Nekolny v. Painter, 653 F.2d 1164 (7th 1981)

Facts: Brought by former county employees fired because they had campaigned for the wrong person.

1166 Jury awarded big $: 40,000. lost pay
5,000 emotional distress
5,000 punatives

Held. p. 1172 Although mental & emotional distress caused by denial of 1A rights is compensable, there must be proof of actual injury. There was hardly any proof of emotional distress. Only testimony was vague. [Note - This is bad opinion: seems to require direct evidence; ignores inferences.]
Rest of the award stands.
[Argue that Ct. of Ap. probably felt that pltfs. were substantially compensated by back pay.]

al violation in order to determine damages.[96]

[6] 3. Damage suits for the vindication of individual rights date from the eighteenth century in England,[97] and have been widely recognized in our courts.[98] The Supreme Court stated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, "[D]amages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." [99] The instant suit is squarely within this tradition, and the Halperins are "entitled to recover money damages for any injuries [they have] suffered as a result of the * * * violation of the [Fourth] Amendment." [100]

[7] Even if a constitutional violation inflicts only intangible injury, compensation is still appropriate. In *Paton v. LaPrade* the Third Circuit enumerated many of the intangible injuries that might have been suffered by a student unreasonably investigated by the FBI: "stigmatization, invasion of privacy, interference with personality development, and interference with her freedom of association through the decision of others to shun her." [101] This approach has been followed by other circuits in suits alleging constitutional violations by state officials under 42 U.S.C. § 1983 (1976).[102]

Due to the plaintiffs' reliance on a "presumption" of injury in requesting a damage award, the District Court concluded that there was "no demonstrable injury." [103] We

96. Although the plurality in *Zweibon I, supra* note 49, found that some of the procedures and the civil damages provision of Title III should apply to unconstitutional wiretaps in national security situations, our ruling in *Zweibon III, supra* note 65, restricts that position to prospective effect. As a result, the District Court in this case will have to consider compensatory damages for any unconstitutional surveillance. *See also* note 106 *infra*.

97. *See Entick v. Carrington*, 95 Eng.Rep. 807, 19 How.St.Tr. 1030 (1765) (unlawful search by King's officers); *Wilkes v. Wood*, 98 Eng.Rep. 489, 19 How.St.Tr. 1075 (1763) (same).

98. *See, e. g., Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932) (recognizing damage remedy in civil suit alleging wrongful denial of right to vote); *Wayne v. Venable*, 260 F. 64 (8th Cir. 1919) (same).

99. 403 U.S. 388, 395, 91 S.Ct. 1999, 2005, 29 L.Ed.2d 619 (1971). In Justice Harlan's pithy phrase, "For people in Bivens' shoes, it is damages or nothing." *Id.* at 410, 91 S.Ct. at 2012 (Harlan, J., concurring).

100. *Id.* at 397, 91 S.Ct. at 2005. In *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the Supreme Court ruled that in the absence of proof of injury plaintiffs alleging violation of procedural due process rights may win only nominal damages. We think that holding does not require a similar award to the Halperins for two reasons. First, the Court emphasized that the "prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another." *Id.* at 264–265, 98 S.Ct. at 1053. The due process issue in *Piphus* concerned a student's right to a pre-suspension hearing, so it would indeed have been difficult to estimate the plaintiff's injury unless he could have shown that he would not have been suspended if a hearing had been held. The substantive rights asserted by the Halperins are of a much different character, as is evident from the traditional damage remedy for unlawful search marked by the English cases of *Entick* and *Wilkes, supra* note 97, and our *Bivens* doctrine. *See Carey v. Piphus, supra*, 435 U.S. at 264–265, 98 S.Ct. 1042 (distinguishing cases involving "denial of Fourth Amendment rights"). Second, the Supreme Court ruled that the plaintiff in *Piphus* might still prove actual injury but simply could not claim a presumption of injury. *Id.* at 262–264, 98 S.Ct. 1042. To the extent that the plaintiffs here can establish actual though intangible injury, damages would clearly be appropriate even under *Piphus*.

101. 524 F.2d 862, 871 (3d Cir. 1975). Because it involved First Amendment and privacy rights, *Id.* at 869–870, *Paton* is not limited by the Supreme Court's *Piphus* ruling. *See* note 100 *supra*.

102. *See, e.g., Seaton v. Sky Realty Co.*, 491 F.2d 634, 636–638 (7th Cir. 1974); *Donovan v. Reinbold*, 433 F.2d 738, 743 (9th Cir. 1970).

103. *Halperin v. Kissinger, supra* note 5, 434 F.Supp. at 1195. Plaintiffs attribute their course to a pre-*Piphus* belief that injury should be presumed, based on the lower court rulings in *Piphus v. Carey*, 545 F.2d 30 (7th Cir. 1976), and *Hostrop v. Board of Junior College District No. 515*, 523 F.2d 569 (7th Cir. 1975), *cert. denied*, 425 U.S. 963, 96 S.Ct. 1748, 48 L.Ed.2d 208 (1976). *See* note 100 *supra*. We see no reason why, on remand, they should not be permitted to amend their pleadings and attempt to demonstrate injury.

Damages

Piphus does not apply to 1st A.

think that conclusion neglected the possibility that plaintiffs might show loss due to emotional distress and mental anguish, traditional bases for tort recovery. Such harm might be demonstrated through direct testimony of the plaintiffs or might be "inferred from the circumstances," [104] and if established would surely entitle the Halperins to more than nominal recovery. This court has held that in cases involving constitutional rights, compensation "should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *." [105] Specifying such damages will always be difficult, but they must be at least "an amount which will assure [the plaintiff] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the courts." [106]

IV. THE IMMUNITY DEFENSE

[8] All individual defendants claim an absolute immunity from civil damage suits for actions undertaken in their official capacities. The District Court rejected these claims, and we agree with that ruling. Defendants, including former President Nixon, are entitled to a qualified immunity on both the Fourth Amendment and the Title III claims if they can show that they had reasonable grounds for believing their actions were legal (the "objective" basis) and that there was no malice or bad faith in either the initiation or the conduct of the wiretapping (the "subjective" basis).[107] Because former President Nixon advances particular arguments in support of his own absolute immunity, we will consider his status separately.

A

[9, 10] Officials making adjudicative and prosecutorial decisions are absolutely immune from civil suit based on such actions. This doctrine assumes that the initiation of a prosecution and the resolution of a dispute are especially likely to incite individualized wrath,[108] and that the review processes of the judicial system provide an automatic safeguard against improper actions.[109] Absolute immunity is not available, however, for those same officials for acts not involving adjudication or prosecution.[110]

In *Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), the Supreme Court outlined two bases for qualifying the immunity from suit enjoyed by Executive officials: (1) without such qualification the damage actions contemplated by *Bivens* would be "drained of meaning" and many constitutional violations would go un-

104. *Seaton v. Sky Realty Co., supra* note 102, 491 F.2d at 637–638.

105. *Tatum v. Morton*, 183 U.S.App.D.C. 331, 334, 562 F.2d 1279, 1282 (1977) (First Amendment claim).

106. *Id.*, 183 U.S.App.D.C. at 339, 562 F.2d at 1287 (Wilkey, J., concurring). Although not directly controlling for Fourth Amendment violations, *see* note 65 *supra*, it is certainly illuminating that Congress in Title III identified $100 a day as the proper award for victims of unlawful wiretapping. *See* 18 U.S.C. § 2520 (1976). One would expect substantial correspondence between that legislatively established figure for compensation and the amount appropriate for Fourth Amendment violations involving similar harms flowing from similar actions.

107. *See Zweibon, I, supra* note 49, 170 U.S. App.D.C. at 77–80, 516 F.2d at 670–673.

108. *Butz v. Economou*, 438 U.S. 478, 509–510, 512, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 424–426, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

109. *Butz v. Economou, supra* note 108, 438 U.S. at 512, 98 S.Ct. 2894; *Imbler v. Pachtman, supra* note 107, 424 U.S. at 427, 96 S.Ct. 984; *see also Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). *See generally Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

110. Although defendant Mitchell might be entitled to prosecutorial immunity for some of his actions as Attorney General, this is not such a case since there is no allegation that the Halperin surveillance was part of a criminal prosecution. *See Forsyth v. Kleindienst*, 599 F.2d 1203, 1214–1215 (3d Cir. 1979); *Apton v. Wilson*, 165 U.S.App.D.C. 22, 32, 506 F.2d 83, 93 (1974); *Briggs v. Goodwin*, 186 U.S.App.D.C. 179, 569 F.2d 10 (1977), *cert. denied*, 437 U.S. 904, 98 S.Ct. 3089, 57 L.Ed.2d 1133 (1978).

Halperin v. Kissinger, 424 F.Supp. 838, (D. D.C. 1976), subsequent opinion, 434 F.Supp. 1193 (D. D.C. 1977),
606 F.2d 1192 (D.C. Cir. 1979), affirmed in part and cert. dismissed in part, 452 U.S. 713, 101 S.Ct. 3132, 69 L.Ed.2d 367 (1981)(per curiam).

J ℮ respect to Kissinger, Nixon, ~~Haldeman~~ Mitchell, affd by equally-divided ct.
As to Haldeman, writ of cert dismissed as improvidently granted.

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424 F.Supp. 838

845 Subjective good faith defense unavailable. Regardless of intention violated plaintiffs' constitutional rights. "Like any other citizen, these officials are charged ℮ knowledge of established law & must be held accountable for personal misconduct."

846 Sullivan entitled to good faith defense. Repeatedly recommended discontinuance of tap.

Action under 1st, 4th, 5th, 9th As, stat. For illegal tapping of Halperin's home phone.

606 F.2d 1192

J against Nixon and Haldeman and Mitchell upheld. Denial of sum J as to Kissinger reversed. Also reversed as to proper measure of damages.

Briggs v. Goodwin, 698 F.2d 486 (D.C. Cir. 1983)

relies on the fact that appellants were all acquitted, and contends that therefore no violation of the Sixth Amendment occurred.[24]

The threat of significant harm required by *Weatherford* does not, however, have to amount to "prejudice" in the sense of altering the actual outcome of the trial.[25] Although the Sixth Amendment is concerned primarily with fairness at trial, it is not limited to that function.[26]

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ment, to whom he sent all information, was appellee Goodwin. Pence Dep. at 12-14, 40-41, J.A. at 224-26, 232-33. Moreover, even in the absence of this specific evidence, Judge MacKinnon's assertion once again ignores that on summary judgment all inferences are to be drawn in favor of the appellant. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Where information bearing on a pending case is sent to the Justice Department, it is hardly a great leap of faith to infer that it "actually" reached the prosecutors in the case.

[24] In a slightly different argument, appellee contends that because of appellants' acquittal on criminal charges, appellants can show no damages or cannot prove the actual amount of any damages they suffered even if a Sixth Amendment violation occurred. We agree that the injuries allegedly suffered by appellants may be intangible and elusive. We also agree that appellants may have a difficult time proving actual "damages" in the tort sense, and that such proof is necessary for them to recover a compensatory award. Carey v. Piphus, 435 U.S. 247, 257-65 (1978). Nevertheless, they should be given an opportunity to do so. Moreover, a cause of action arising from the violation of the appellants' constitutional rights is "actionable for nominal damages without proof of actual injury." *Id.* at 266; *see also* Basista v. Weir, 340 F.2d 74 (3d Cir. 1965).

[25] *Cf.* United States v. Morrison, 449 U.S. 361, 367 (1981) (implying possible civil damage action when Sixth Amendment violation does not alter overall fairness of criminal trial).

[26] *See* Miranda v. Arizona, 384 U.S. 436, 465-66 (1966) (counsel ensures fair treatment by government officials); Escobedo v. Illinois, 378 U.S. 478, 486-87 (1964) (same); United States v. Valencia, 541 F.2d 618, 622 (6th Cir. 1976); Fitzgerald v. Estelle, 505 F.2d 1334, 1337-38 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975).

Volume 110 - Number 193 - Page 2221 Tuesday, October 5, 1982

THE DAILY WASHINGTON
Law Reporter

Established 1874

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

NOTICE

The law regarding Post-Judgment Interest Rates has been amended by Section 302 of the Federal Courts Improvement Act of 1982, effective October 1, 1982. The Act establishes a new, uniform national interest rate, subject to change every four weeks. It will apply to money judgments (except tax cases) entered in District Courts. The new rate will be pegged to the average auction price of the last auction of 52-week Treasury Bills. Margaret Whitacre, Manager, Docketing Operations (535-3506), will have information on the current rate.

Interest accrues from the date the judgment is entered on the docket, and the date of such entry will forever determine the interest rate applicable to that judgment.

It is not clear what interest rate will apply to judgments entered before October 1, 1982, which remain unsatisfied thereafter. Two equally plausible legal theories are (1) that such judgments should accrue interests exclusively under state law in accord with previous practice, or (2) that the rate should be set under state law until October 1, 1982, and thereafter be changed to the Federal rate. The General Counsel of the Administrative Office of the United States Courts takes the first position, so Clerk's Offices nationwide will adopt it until or unless there is a judicial decision to the contrary.

James F. Davey
Clerk

DAMAGES - Headnote 51

Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), cert. denied, 438 U.S. 916, 98 S.Ct. 3146, L.Ed.2d ( ).

173 Suit by Dellums, as individually, and 9 persons representing as a class all persons arrested on Capitol steps on May 5, 1971, while being addressed by Dellums during course of anti-war demo. Δs: various U.S. officials, D.C. officials & D.C. Allegation: civil conspiracy to arrest & detain class members & purpose of frustrating their 1st A. right to protest against war. Liability asserted under 1st, 4th, 5th, 6th, 8th Amendments, 42 U.S.C. § 1981 et seq., & law of D.C.

174 Class certified: "all persons who were arrested while assembled on the Capitol steps on May 5, 1971."

Jury trial in December 1974.

174 n. 6 Damages awarded by jury (xerox attached)

194 Each class member & Dellums awarded $7,500 for violation of 1st A. rights.

195 "...[T]he quantum of damages to be awarded for First A. violations is... in principle no less administrable than damage awards for other intangible interests protected by the Constitution or at common law."

Pl "Basically, what is at stake here is loss of an opportunity to express to Congress one's dissatisfaction with the laws and policies of the United States."

Discussion of unique significance of demonstrations - very good language.

Pl "That loss of an opportunity to demonstrate constitutes loss of First A. rights 'in their most pristine and classic form' does not mean, however, that monetary recompense should be extravagant. The award must be proportional to the loss involved insofar as it seeks to compensate intangible injuries. The jury cannot simply be set loose to work its discre- (196) tion informed only by platitudes about priceless rights."

195 - Error because jury instructions did not focus on loss actually sustained by Pls. Not a case in which demo thwarted altogether; program virtually complete when arrests made in any substantial number. Remand for redetermination of 1st A. damages because "[i]n these circumstances, the $7,500 judgment is totally out of proportion to any harm

For the ct: Skelly Wright
Concurring: Leventhal
Dissenting: Tamm
Trial: Bryant, C.J.

that has been suffered...." Dith re Dellums' damages.

Leventhal, concurring:

208 As didn't challenge scale on which damages for false arrest/imprisonment awarded. Jury, using ct's Form of Verdict, "able to award damages along a sliding scale which took into account, in a rough way, the different experiences of different members of the class, without losing administrative feasibility."

Jury instructions re damages for cruel & unusual punishment erroneous in that permitted award of damages duplicative of those for false arrest/imprisonment. Also, blanket $500 inappropriate because "individual Ps were confined under greatly differing conditions."

209 Uniform award ∴ inappropriate.

"An award for violation of a first a. right must be commensurate with the value to the P of the right that has been lost. The jury must take into account the extent to which the Ps were actually impeded in imparting and receiving messages... Every action for damages has some potential for deterrence, but in the absence of special circumstances calling for exemplary damages, the amount of the award should be based on compensation, not punishment or deterrence."

Special scrutiny of instructions, special obligation to undertake close scrutiny upon appellate review in class action because "a distortion in the size of the award to the individual P may be magnified thousand-fold."

Instructions did not give adequate guidance. Did not inform that: obligation to be reasonable in award; should reflect value to Ps of lost opportunity for assembly & expression; should consider extent to which Ps did get their message delivered through totality of incidents.

Other prob with award: its size suggests that punitives an element & was no claim for punitive damages. Jury may have incorrectly assumed its authority included possibility of punitive damages.

"... [A]n individual P suing for violation of first a. rights is not limited to out-of-pocket expenses but may, upon a proper showing, recover for emotional (210) harm. citations omitted."

210 But in fairness uniform class award for first a. damages cannot encompass this.

211 "The remand of the damages determination reflects a proper judicial concern

that the Tlg should receive full compensation for the impairment of their rights and their suffering, but not a windfall."

566 F.2d 167 - N. 51 -

70 F.R.D. 648 (irrelevant - discovery issue)

gresswoman Abzug was addressing the crowd, at about 3:30 P.M., the police cordoned off the bottom of the steps, preventing anyone from leaving, and began arresting members of the assemblage. Arrests continued over the protests of Congressman Dellums and other Members of Congress, and the police refused Dellums' offer to persuade the crowd to disperse.

The complaint further alleged that those arrested were held for periods of from several hours to several days without being afforded due process of law. In addition, conditions of detention were said to have been inhumane in that there was severe overcrowding, inadequate sanitation, inadequate or filthy bedding, insufficient food, and no medical care. Access to attorneys and telephones was said to have been denied or severely restricted.

In answer the defendants generally denied that the demonstration at the Capitol had been peaceful and in accord with applicable law. They asserted probable cause for the arrests made at the Capitol and official immunity from prosecution. The District of Columbia raised its municipal immunity as a defense and further claimed that the individual defendants were at all times the servants of the United States. All defendants denied that conditions of detention had been inhumane.

After a period of pretrial motion practice and discovery, the trial court certified this suit as a class action in May 1973 and defined the class as "all persons who were arrested while assembled on the Capitol steps on May 5, 1971."[4] This action came on for trial before a jury in December 1974. The evidence adduced at trial, as shall appear more fully below, was in conflict and provided support for the contentions in both the complaint and the answer. At the close of plaintiffs' case and again at the close of all the evidence, the defendants remaining in the case[5]—Deputy Attorney General Kleindienst, United States Capitol Police Chief James M. Powell, District of Columbia Police Chief Jerry V. Wilson, and the District of Columbia—each moved for a directed verdict. Deputy Attorney General Kleindienst's motion was granted; all others were denied. The case was submitted to the jury and substantial verdicts were returned, as indicated in the margin.[6]

Chiefs Powell and Wilson and the District of Columbia each prosecuted appeals from the judgment entered below on the jury verdicts. The plaintiffs below have also appealed the directed verdict in favor of Deputy Attorney General Kleindienst. Finally, Chief Powell and the District have appealed from an order reinstating to this action three named plaintiffs who were dismissed before trial for failing to comply with discovery requests. These appeals were consolidated for argument; however, we have found it convenient to write separately in each. Accordingly, we will take up Chief Powell's appeal from the judgment below in this opinion; the points

4. Order of May 25, 1973, JA 85. The court also ordered defendants to provide "whatever information they have on the identity of class members," *id.*, so that notice could be afforded the class. *See* Rule 23(c), Fed.R.Civ.P. Defendants were ordered to pay the cost of notice, a practice which has since been ruled inappropriate by the Supreme Court, *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), but which constitutes harmless error in the context of this suit.

5. *See* note 1 *supra*.

6. The damages awarded by the jury are as follows:

A. *For False Arrest and False Imprisonment*:
(1) for 12 hours or less of detention, $120;
(2) for 12 to 24 hours of detention, $360;
(3) for 24 to 48 hours of detention, $960;
(4) for 48 to 72 hours of detention, $1,800.

B. *For Violation of First Amendment Rights*:
$7,500 for each class member and $7,500 for Congressman Dellums.

C. *For Cruel and Unusual Punishment*:
$500 for each member of the plaintiff class.

D. *For Malicious Prosecution*:
(1) $3,000 for each of eight persons who were defendants in a 1971 criminal trial;
(2) $50 for all other class members.

The judgment for cruel and unusual punishment was rendered against the District of Columbia alone. All other awards run jointly and severally against defendants Powell, Wilson, and the District of Columbia. For a summary of the results of this appeal, *see* note 89 *infra*.

DAMAGES - Headnotes 1, 2

Tatum v. Morton, 562 F.2d 1279 (D.C. Cir. 1977).

Participants in peaceful Quaker prayer vigil outside White House on sidewalk arrested. Sued police, fed officials, D.C. Awarded damages & other relief but Pls appealed nonetheless. Held: trial ct erred in various respects in limitations it placed on recoverable damages. Remanded.

1281 Alls Pls were arrested & booked & 3-4 hrs. elapsed before any were offered opportunity to post $10 collateral. Some chose not to & were thus held longer.

Dist ct awarded $100 to each Pl + additional $64 to one Pl for lost wages. Ordered inspector who ordered arrests to pay $500 personally, rest of damages being awarded against D.C. Denied punitives. Dist ct said Pls entitled to "only 'limited' damages."

1282 Dist ct's approach in error.

"First, and perhaps foremost, is the conception that the recovery should be 'limited' because the Pls were participating in a demo. The right to demonstrate is a significant strand of the cluster of First A. rights. The vindication of these rights warrants more than token acknowledgement."

"Compensation for denial of First A. rights should not be extravagant, say to the point of awarding the equivalent of what would be a year's, or even six month's compensation for the average person. Correspondingly such a compensation award should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right to demonstrate."

1283 - Objective of publicity by holding vigil cannot undercut Pls' entitlement to damages for an unreasonable arrest. "... [W]e cannot approve such use of concepts of offset or credit for benefits."

1283 Refusal to post collateral cannot be taken as adequate justification for limiting recovery across the board. I.e., not sound to impose an absolute duty to mitigate.

1285 Affirmed without comment district court's determination to deny punitive damages.

3d member - Wright
For the ct: Leventhal
Concurring opinion: Wilkey
Trial j.: Gasch

Wilkey, concurring:

1285 Pl "It is noteworthy that we have not enunciated any precise mathematical standard for the calculation of damages for the First A. violation...."

1286 "Risks" inherent in Pls' enterprise from the beginning & some of which materialized have some bearing on damages to be awarded.

1286-1287 A collective enterprise & measure of damages more fairly assessed as collective damages.

1287 "Looking at the wrong done as a collective wrong, the total amt awarded against the Δ D.C. should be sufficiently sizeable to discourage repetition of such illegal police action in the future, & being of such horrendous size as to shock the public -- taxpaying -- conscience. The total amt should be sufficient, when divided among the twenty-seven Pls, to give each an amount which will assure him that First A. rights are not lightly to be disregarded and that they can be truly vindicated in the courts."

562 F.2d 1279 - Notes 1-2

606 F.2d 1208 - Halperin v. Kissinger

402 F.Supp. 719 - lower ct decision in Tatum

DAMAGES - Headnote 7

Halperin v. Kissinger, 606 F.2d 1192 (D.C. Cir. 1979).

Wright, C.J. / Gesell (concurring opinion) / Robinson

Former National Security Council staff member & family brought suit for damages against Ad officials, alleging that wiretap of his home violated 4th A., Omnibus Crime Control and Safe Streets Act. Held, inter alia, Pls entitled to recover money damages for any injuries they might have suffered as the result of any constitutional violations.

1205 Wiretap on for 21 months.

1207 P "Even if a constitutional violation inflicts only intangible injury, compensation is still appropriate."

1207 n. 103 Pls had relied on pre-Piphus belief that injury should be presumed. On remand, permit amendment of pleadings & allow them to attempt to demonstrate injury.

1208 "Such harm [due to emotional distress and mental anguish] might be demonstrated through direct testimony of the Pls or might be 'inferred from the circumstances,' and if established would surely entitle the Halperins to more than nominal recovery. This Ct has held that in cases involving constitutional rights, compensation 'should not be approached in a niggardly spirit. It is in the public interest that there be a reasonably spacious approach to a fair compensatory award for denial or curtailment of the right * * *.'" (citing Tatum) Specifying such damages will always be difficult, but they must be at least 'an amt which will assure [the P] that [personal] rights are not lightly to be disregarded and that they can be truly vindicated in the cts.'" (citing Tatum)